United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2337

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To be argued by
ALAN R. KAUFMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2337

UNITED STATES OF AMERICA,

Appellee,

—v.—

SIMONE MORANDI,

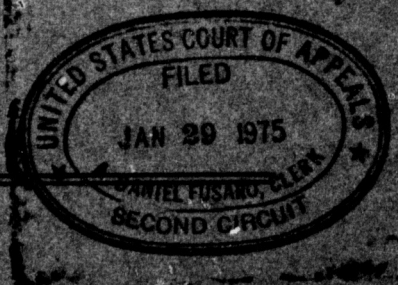
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ALAN R. KAUFMAN,
JOHN D. GORDAN, III,
Assistant United States Attorneys, Of Counsel.



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Preliminary Statement

Simone Morandi appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on September 19, 1974, after a three-day trial before the Honorable Irving Ben Cooper, United States District Judge, and a jury.

Indictment 73 Cr. 1089, filed December 3, 1973, charged Morandi and three other defendants with violations of the federal narcotics and firearms laws. Morandi was charged in Count One with conspiring to distribute narcotics, and in Count Two with possessing with intent to distribute approximately nine ounces of cocaine, in violation of Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A) and 846. Morandi was also charged in Count Four with carrying a firearm during the commission of a felony in violation of Title 18, United States Code, Section 924(c)(2).

Trial commenced on June 24, 1974, and ended on June 26, 1974, when the jury convicted Morandi on Counts One, Two and Four.*

On September 19, 1974, Judge Cooper sentenced Morandi to three concurrent sentences of three years imprisonment, to be followed by a special parole term of three years.

Morandi is currently serving his sentence.

Statement of Facts

A. Government's Case

On November 2, 1973, Special Agent William Lunsford, acting in an undercover capacity, met with co-defendants Keith Copen and William Standbridge at Copen's apartment in Queens, and purchased four ounces of cocaine from them for $4,600. During this transaction, both Copen and Standbridge told Lunsford that they had a good connection, and that they could get all the cocaine the agent wanted on a regular basis. (Tr. 19-28).**

On November 11, 1973, Agent Lunsford negotiated with Copen for eight ounces of cocaine. Copen informed the agent that he would be entering the hospital for a few days and inquired whether Lunsford would do the deal in the hospital. Lunsford refused and told Copen to make other arrangements. On November 13, 1973, Lunsford called Copen at Columbia-Presbyterian Hospital, and Copen said that Standbridge would sell the eight ounces for $8,500 at the Blue Bay Diner in Queens at 6:00 that evening. (Tr. 29-31).

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* Morandi's three co-defendants were Keith Copen, William Standbridge and Carlos Paz. Paz was a fugitive at the time of trial. Copen and Standbridge pleaded guilty to the conspiracy count. Copen was sentenced to four years probation; Standbridge, to seven years imprisonment.

** "Tr." refers to the trial transcript.

Standbridge met Agents Lunsford and Kennedy at the prescribed place, without the cocaine, stating that he and "his man" did not like the looks of the place and wanted to do the deal elsewhere. Standbridge directed the agents to the Northern Cross Diner, where he told them to wait for him to return with the cocaine. About thirty minutes later, the agents observed Standbridge drive through the area, passing the diner two or three times, accompanied by another unidentified individual. Standbridge did not stop to do the deal. Agent Lunsford contacted Copen, who said that Standbridge had been with his man at the diner, and that they had seen people in the vicinity whom they did not recognize and had called off the deal. (Tr. 33-36, 43-44, 64-66, 130-132).

Lunsford contacted Copen the next day and they arranged that Standbridge would deliver the cocaine in Copen's hospital room. (Tr. 44-46). Surveillance was established at Columbia-Presbyterian Hospital, and at approximately 2:30 p.m., Standbridge was seen driving south on Fort Washington Avenue, in the vicinity of the hospital. He was driving a white Oldsmobile convertible with black top, with two other occupants, one on the front passenger seat, the other on the rear seat. Both were looking around from side to side. The individual seated in the back of the car was Simone Morandi. (Tr. 62-67, 86-87, 132).

Standbridge went up to Copen's hospital room. Agent Lunsford called Copen at 2:45 p.m., and Copen told Lunsford that the person had arrived with the package and that everything was set. A short while later, after having heard from the surveillance team, Lunsford called Copen again, and, pretending that he and Agent Kennedy were at the hospital, told Copen that he had seen people in the street with Standbridge and that they, the agents, were afraid of being robbed. Copen said that they were being as paranoid as Standbridge had been the night before, and that if Luns-

ford did not take the package, he, Copen, would lose his connection. Then Standbridge took the phone from Copen, and Agent Lunsford asked him about the people with whom Standbridge had arrived, stating that it looked like the "Spanish Army". Standbridge stated that those Colombians were just there to see that nothing went wrong, to see that he did not get hurt. When Agent Lunsford indicated that he would not go through with the deal, Standbridge stated that those people were a good connection, and that if Lunsford did not take the package, Standbridge would never be able to obtain cocaine from them again. (Tr. 47-52, 112-113).

Lunsford and Standbridge then arranged to do the deal outside the hospital. As Standbridge left Copen's hospital room at about 3:30, he was arrested. Found in Standbridge's possession was a revolver and nine ounces of cocaine. (Tr. 52-53, 114-117, 124-126).

At approximately 4:50 p.m., Agent Logan, a member of the surveillance team, located Standbridge's Oldsmobile at Broadway and 166th Street, near the hospital. Two men were seated on the front seat of the car, Morandi in the passenger seat. (Tr. 96-99). At approximately 5:20 p.m., additional agents arrived at the scene. One of them was Agent Grimes, who had seen Morandi at 2:30 sitting in the back seat of the car being driven by Standbridge. Agent Grimes identified himself to the occupants of the car and ordered Paz and Morandi to put their hands in the air and get out of the car. Paz immediately raised his hands. Morandi hesitated, however, by placing one hand behind him before raising both hands. Then Morandi and Paz, with their hands still raised, left the car on the passenger side. (Tr. 69-73). As soon as Paz and Morandi were out of the car, Agent Logan, at the open passenger door, peered into the car to make a cursory search for weapons. In order to look into the back seat area of the car, it was necessary

for Agent Logan to bend the back of the front passenger seat forward. When he did so, he saw a .38 caliber revolver on the front passenger seat, in the space where the seat and the upright back portion come together. This was the seat previously occupied by Simone Morandi. The gun was seized and found to be fully loaded. Simone Morandi was not licensed to carry a gun in New York City. (Tr. 99-101, 119-121).*

At approximately 6:30 p.m., Morandi was being processed at the offices of the Drug Enforcement Administration. Morandi was searched by Agent Rose, who found in Morandi's shirt pocket a small tinfoil packet which contained .29 grams of cocaine. Morandi then took out a handkerchief, blew his nose into it and then threw it on the floor. Agent Rose noticed that the handkerchief was knotted at one end and he retrieved it, unknotted it, and found in it .34 grams of cocaine. (Tr. 134-142).

B. Defense Case

Morandi did not call any witnesses and he did not testify in his own behalf.

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* This gun forms the basis of Count Four.

ARGUMENT

POINT I

The motions to suppress the physical evidence were properly denied.

On June 4, 1974, a hearing was held on Morandi's motion to suppress the .38 caliber revolver found in the car in which he was arrested and the small quantities of cocaine found in his possession at the offices of the Drug Enforcement Administration. The basis of the motion below, reiterated in this appeal, is that the agents did not have probable cause to arrest Morandi and, therefore, the seizures of the gun and cocaine were improper.

If probable cause existed, then the seizures were justified as searches incident to arrest. *Chimel* v. *California,* 395 U.S. 752 (1969); *Beck* v. *Ohio,* 379 U.S. 89 (1964); *Carroll* v. *United States,* 267 U.S. 132 (1925). Probable cause exists when the facts and circumstances within the agents' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. *Spinelli* v. *United States,* 393 U.S. 410 (1969); *Sibron* v. *New York,* 392 U.S. 40 (1968); *Brinegar* v. *United States,* 338 U.S. 160 (1949). Probable cause is determined by the sum total of information, observations and reports known to the arresting agents. *Raffone* v. *Adams,* 468 F.2d 860 (2d Cir. 1972); *United States* v. *Manning,* 448 F.2d 992, 999 (2d Cir.) (*en banc*), *cert. denied,* 404 U.S. 995 (1971). The facts herein, when taken together, clearly establish probable cause for the arrest of Morandi.

The agents knew that Standbridge was a seller of cocaine and that Copen was the go-between, bringing the undercover agents together with Standbridge. The agents had actually bought four ounces of cocaine from Standbridge on November 2, 1973 in Copen's apartment. (P.Tr. 7-8).*

Copen also arranged for Standbridge to sell a larger quantity of cocaine to the agents on November 13, 1973. The transaction was never completed on that date, though agents observed Standbridge in the area, accompanied in his car by another individual. It was on this occasion that the agents learned that Standbridge was working with at least one other individual, because when the deal did not materialize, Agent Lunsford called Copen, who told the agent that Standbridge's "man" was with him in the car and called off the deal, because he did not like the looks of things. (P.Tr. 8-11).

Copen then arranged to have Standbridge deliver the cocaine to Agent Lunsford in Copen's hospital room the next day. Surveillance agents observed Standbridge arrive in the area in a car accompanied by two men, one of whom was Morandi. Standbridge took the cocaine to Copen's hospital room. Agent Lunsford called Copen to tell him that he had seen the people with Standbridge, calling them the "Spanish Army", and that the deal was off because he was afraid of a "rip-off". Standbridge got on the phone and told Agent Lunsford that those people were for Standbridge's protection, to see that nothing went wrong. Then he said that if Agent Lunsford did not go through with the deal, he would be hanging Standbridge up wtih these people and they would never again supply him with cocaine. Agent Lunsford communicated the substance of this conversation to the other agents. Standbridge was then arrested and found in possession of a revolver and nine ounces of cocaine that were to be sold to Agents Lunsford and Kennedy. (P.Tr. 11-15, 21-24, 47-49, 63).

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* "P.Tr." stands for the transcript of the pre-trial suppression hearing.

The agents then searched the vicinity of the hospital, looking for the car in which Standbridge had arrived, and for the two occupants. The car was located over an hour later, about two blocks from the hospital with Morandi and Paz in it, apparently still waiting for Standbridge to return. (P.Tr. 49-50). Morandi, upon being ordered to raise his hands and exit the car, first placed one hand behind his back. (P.Tr. 26-27). As soon as Morandi and Paz were out of the car, Agent Logan conducted a cursory, visual search of the car, and upon bending forward the upright portion of the front passenger seat (where Morandi had just been sitting), in order to look into the rear area of the car, Logan found a loaded .38 caliber revolver on the front seat. (P.Tr. 50-51). Later, when Morandi was searched at the offices of the Drug Enforcement Administration, a small quantity of cocaine was found in his pocket and another small quantity was found in a handkerchief he had just discarded. (P.Tr. 64-65).

On the basis of this testimony, the trial judge was more than justified in finding probable cause for the arrest of Morandi.* On November 14, Morandi had arrived with Standbridge, and the agents had observed him looking from side to side as Standbridge's car drove slowly near the hospital. Standbridge told Agent Lunsford that the people in the car were his "connection" and were there to protect Standbridge from any harm. After Standbridge had been arrested in possession of nine ounces of cocaine and a revolver, the agents searched for the car and located it at about 4:50 P.M., nearly two and a half hours after Stand-

* Judge Cooper credited the agents' testimony in its entirety and found that probable cause to arrest Morandi existed, thus justifying the searches incident to arrest. The probable cause was so clear in fact, that Judge Cooper characterized the appellant's motion as a fishing expedition to obtain discovery of the Government's case three weeks before trial. The appellant was successful in that regard, since the testimony at trial paralleled the suppression hearing. (P. Tr. 70-71).

bridge had arrived to sell the cocaine; Morandi was still inside, apparently waiting for Standbridge's return. Knowing these facts, the agents were fully justified in concluding that Morandi was a participant with Standbridge in the aborted cocaine sale. *United States* v. *McCarthy,* 473 F.2d 300, 305-306 (2d Cir. 1972); see also *United States* v. *Olsen,* 453 F.2d 612, 615-616 (2d Cir.), *cert. denied,* 406 U.S. 927 (1972).

Having properly arrested Morandi, the agents were justified in searching, incident to the arrest, the area within his immediate vicinity when he was arrested; the revolver they discovered was just inches from where he had been sitting when arrested. *United States* v. *Sperling,* Dkt. No. 73-2363 (2d Cir., October 10, 1974), slip op. at 5671-5672 n. 31; *United States* v. *Jenkins,* 496 F.2d 57, 72-73 (2d Cir. 1974); *United States* v. *Manarite,* 448 F.2d 583, 593 (2d Cir.), *cert. denied,* 404 U.S. 947 (1971); *United States* v. *Soriano,* 497 F.2d 147, 150 (5th Cir. 1974) (en banc); *United States* v. *Frick,* 490 F.2d 666 (5th Cir. 1973).* The

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* While unnecessary to sustain either the arrest or search here, the Government submits that there are at least two further independent grounds to support them.

Assuming *arguendo* that the agents lacked probable cause to arrest Morandi, what they knew was more than sufficient for his arrest when coupled with the discovery of the revolver wedged in the car seat which Morandi was sitting in. But their right to search the car seat did not depend on their right to arrest Morandi. The agents had probable cause to believe that the automobile Morandi was sitting in had carried Standbridge and the cocaine to the rendezvous at the hospital. Consequently, the car was subject to seizure and forfeiture, and the agents were entitled to search it without probable cause as to its contents. *Cooper* v. *California,* 386 U.S. 58 (1967); *United States* v. *Capra,* 501 F.2d 267, 280 (2d Cir. 1974); *United States* v. *Ortega,* 471 F.2d 1350 (2d Cir.), *cert. denied,* 411 U.S. 948 (1973); *United States* v. *Ayers,* 426 F.2d 524 (2d Cir.), *cert. denied,* 400 U.S. 842 (1970); *United States* v. *Francolino,* 367 F.2d 1013, 1018-1023 (2d Cir. 1966), *cert. denied,* 386 U.S. 960 (1967). In seizing and searching the car, the agents were plainly entitled to order Morandi out of it, and, upon discovering the pistol where he had been sitting, to

[Footnote continued on following page]

subsequent search of Morandi an hour later at the Drug Enforcement Agency offices and the resulting discovery of the cocaine in Morandi's possession was similarly proper incident to Morandi's arrest. *United States* v. *Edwards*, 415 U.S. 800 (1974).

POINT II

There was sufficient evidence to sustain the conviction on the counts charging violations of the Federal Narcotics Laws.

Morandi argues that there was insufficient evidence to show that he was part of the conspiracy of Copen and Standbridge and to connect him to the narcotics possessed by

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arrest him, given the other information they had. While the arrest took place before the search, we submit that, since there was a wholly separate justification for the search apart from the information the agents had about Morandi, the order in which the search and the arrest occurred should be of no significance. *Cf. United States* v. *Jenkins*, *supra*, 496 F.2d at 73; *United States* v. *Riggs*, 474 F.2d 699, 704 (2d Cir.), *cert. denied*, 414 U.S. 820 (1973).

Secondly, and quite apart from the above, if, *arguendo*, the agents lacked probable cause to arrest Morandi until the discovery of the pistol, they had ample justification, based on what they knew of Morandi's activities and his association with Standbridge, to make an investigative inquiry of Morandi. The facts the agents knew when they approached the car, including Standbridge's statement that the people in the car were there to protect him and the discovery of a revolver in Standbridge's possession on arrest, coupled with their observation of Morandi's furtive movement with one hand behind his back when ordered out of the car and the nearness of Morandi to the car seat once he finally got out, more than justified, for the agents' protection, a cursory search of the passenger side of the front seat for a weapon. *United States* v. *Santana*, 485 F.2d 365 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974). See also *United States* v. *Vigo*, 487 F.2d 295, 298 (2d Cir. 1973); *United States* v. *Riggs*, *supra*, 474 F.2d at 704-705.

Standbridge.* This argument is without merit. The evidence against Morandi, including the hearsay declarations of his co-conspirators, clearly showed his role in the conspiracy as being the man behind the scenes, the man who was the connection for the cocaine, and who was present to protect both his own and Standbridge's interests.

The threshold contention by Morandi is that there was insufficient independent evidence of his membership in the conspiracy to allow a consideration of the co-conspirators' hearsay declarations made in furtherance of the conspiracy. The case law is clear that the Government must show Morandi's membership in the conspiracy by a fair preponderance of the independent evidence in order that the co-conspirators' hearsay declarations be admissible against him. *United States* v. *Calarco,* 424 F.2d 657, 660 (2d Cir.), *cert. denied,* 400 U.S. 824 (1970); *United States* v. *Geaney,* 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied,* 397 U.S. 1028 (1970). Such independent evidence may be entirely circumstantial in nature. *United States* v. *Ragland,* 375 F.2d 471, 475 (2d Cir. 1967), *cert. denied,* 390 U.S. 925 (1968); *United States* v. *Garguilo,* 310 F.2d 249, 253 (2d Cir. 1962). The record shows that the Government satisfied its burden.

The testimony at trial established the following independent evidence of Morandi's membership in the conspiracy. First, from the aborted transaction of the previous evening, it was clear that Standbridge and Copen were not acting alone in the transaction. Further, at 2:30 P.M. on November 14, 1973, Morandi arrived with Standbridge in the vicinity of Columbia-Presbyterian Hospital, where Standbridge was to sell cocaine; Morandi was observed looking from side to side as Standbridge's car proceeded slowly down the street. An hour after his arrival at the hospital,

* Morandi does not challenge the sufficiency of the evidence with respect to the firearm count.

Standbridge was arrested in possession of nine ounces of cocaine and a gun.* Almost three hours after having arrived in the area of the hospital with Standbridge, Morandi, ignorant of Standbridge's arrest, was still in Standbridge's car, still in the vicinity of the hospital, the strong inference being that Morandi, having waited for almost three hours, was waiting for something important, specifically, his cut of the proceeds of Standbridge's sale. When arrested Morandi was in possession of small quantities of cocaine, the narcotic Standbridge was selling, and a .38 caliber revolver, similar to the gun seized earlier from Standbridge.

The Government would concede that if the evidence showed only that Morandi was present in Standbridge's car at 5:00 P.M., with nothing more, that such mere presence would be insufficient proof "aliunde". See *United States* v. *Cirillo,* 499 F.2d 872, 884-886 (2d Cir.), *cert. denied,* 43 U.S.L.W. 3381 (December 9, 1974). However, the evidence, in addition, that Morandi was present, looking from side to side, in the car with Standbridge as it passed near the hospital almost three hours earlier, coupled with the occurrence of the previous evening, strongly suggests that Morandi was actively associated with the venture of Standbridge and Copen. Such an inference becomes compelling

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* Morandi objects, without stating the reasons therefor, to the introduction into evidence of the gun seized from Standbridge. Certainly the existence of that gun is relevant in establishing the conspiracy as it existed, and it is additionally probative in light of the fact that Morandi himself possessed a similar gun. *United States* v. *Ravich,* 421 F.2d 1196, 1204 (2d Cir.), *cert. denied,* 400 U.S. 834 (1970); *United States* v. *Baker,* 419 F.2d 83, 86-87 (2d Cir. 1969), *cert. denied,* 397 U.S. 971 (1970). The cases relied on by Morandi, *United States* v. *Geaney, supra,* and *United States* v. *Mack,* 112 F.2d 290, 292 (2d Cir. 1940), are totally inapposite. Moreover, Morandi could not have been prejudiced by this, in view of the fact that Morandi's own gun was introduced into evidence against him.

and the degree of Morandi's participation becomes clearer, when viewed in light of Morandi's possession and attempted concealment of the .38 caliber revolver and the cocaine.* This evidence is clearly sufficient proof "aliunde". *United States* v. *D'Amato,* 493 F.2d 359, 362-365 (2d Cir.), *cert. denied,* 43 U.S.L.W. 3208 (October 9, 1974); *United States* v. *Ruiz,* 477 F.2d 918 (2d Cir.), *cert. denied,* 414 U.S. 1004 (1973); *United States* v. *Calabro,* 449 F.2d 885 (2d Cir. 1971), *cert. denied,* 405 U.S. 928 (1972).**

Once the Government has satisfied its burden of presenting sufficient independent evidence of Morandi's membership in the conspiracy, then his co-conspirators' hearsay declarations are admissible against him. While the Government submits that the foregoing independent evidence would be sufficient circumstantial evidence to sustain a conviction, *United States* v. *Wisniewski,* 478 F.2d 274, 279-280 (2d Cir. 1973), Standbridge's telephone conversation from Copen's hospital room with Agent Lunsford on November 14, when Standbridge described the individuals in his car—the "Spanish Army", as Lunsford had just called them—as his "protection", and then as his "connection", is conclusive proof of Morandi's guilt.

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* With respect to the admissibility of the cocaine found in Morandi's possession, see *United States* v. *Cirillo, supra,* 499 F.2d at 888-89; *United States* v. *Purin,* 486 F.2d 1363, 1367 (2d Cir. 1973), *cert. denied,* 94 S. Ct. 2640 (1974). *Cf. United States* v. *Mallah,* 503 F.2d 971, 980-981 (2d Cir. 1974).

** Nothing in *United States* v. *Geaney, supra,* cited by Morandi, indicates that the foregoing evidence is insufficient proof "aliunde". Moreover, *Ingram* v. *United States,* 360 U.S. 672 (1959); *United States* v. *Schwartz,* 464 F.2d 499 (2d Cir.), *cert. denied,* 409 U.S. 1009 (1972); *United States* v. *Hysohion,* 448 F.2d 343 (2d Cir. 1971) and *United States* v. *Gallishaw,* 428 F.2d 760 (2d Cir. 1970), all cited by Morandi, have nothing whatsoever to do with this threshold issue, all of them dealing with the degree of criminal intent necessary to sustain a conspiracy conviction.

This same evidence is sufficient to sustain the conviction on the substantive count, since, given the evidence that he was the connection, Morandi had dominion and control over the cocaine, and therefore, exercised constructive possession. See *United States* v. *Vasquez,* 429 F.2d 615 (2d Cir. 1970); *United States* v. *Rosario,* 327 F.2d 561 (2d Cir. 1964). Moreover, Morandi was also charged as an aider and abettor, and the jury was properly instructed on that point. Accordingly, if Morandi's function was merely protection, and he was not the source, his actions still sought to help make the crime succeed, and he would be guilty as an aider and abettor. *E.g., United States* v. *Pui Kan Lam,* 483 F.2d 1202, 1208 (2d Cir. 1973), *cert. denied,* 415 U.S. 984 (1974).

POINT III

The lower court did not abuse its discretion in the sentencing of Morandi.

Morandi argues that the court below abused its discretion in not allowing counsel to see the presentence report, claiming that Judge Cooper stated that it was not his policy to show the report. The record of Morandi's sentencing does not support this claim.

In response to counsel's request to see the report, Judge Cooper stated (Tr. 273-274):

> "The application is denied. Whatever the probation report reveals that is adverse to the defendant I shall announce when I come to pronounce the sentence, and give you a chance if you wish to say anything at that time. But I see nothing in the probation report that warrants your examining the report. Whatever there is in the report that is adverse to the defendant I shall mention."

Thereafter, Judge Cooper listed the adverse aspects of the report, asking Morandi and counsel about them. (Tr. 275-277). Then Judge Cooper, in inviting Morandi to say anything he wished prior to imposition of sentence, told Morandi (Tr. 278):

> "Before you speak I would like you to know that the only things that the probation report reveal that were adverse to you are the points I have already raised with regard to prior arrests."

Clearly then, the record reflects that Judge Cooper fully disclosed the report's adverse facts that he was considering in imposing sentence, and allowed Morandi and counsel to respond to such facts. The record does not reflect a general policy on the part of the lower court to prohibit defense counsel from seeing presentence reports, as disapproved of in *United States* v. *Brown*, 470 F.2d 285 (2d Cir. 1972). Rather, it is clear that Judge Cooper carefully considered all the factors bearing on the sentence to be imposed on Morandi, disclosed those factors, and exercised his discretion, consistent with *Brown*, that it was unnecessary to turn over the presentence report in this case. See *United States* v. *Alexander*, 498 F.2d 934 (2d Cir. 1974).

Morandi also claims that his sentencing was improper due to the lower court's failure to find explicitly that Morandi would not benefit from a sentence imposed under the Youth Correction Act, Title 18, United States Code, Sections 5005, *et seq.*, as required by *United States* v. *Kaylor*, 491 F.2d 1133 (2d Cir. 1974) (en banc), *vacated*, 42 U.S.L.W. 3710 (July 8, 1974); *Dorszynski* v. *United States*, — U.S. —, 42 U.S.L.W. 5156 (June 26, 1974).

Morandi, however, was not eligible to be sentenced as a youth offender. A "youth offender" is defined by Title 18, United States Code, Section 5006(e) as a person *under* the age of 22 years at the time of conviction, which in this case

was September 19, 1974, the date judgment was entered on the verdict of guilty. Title 18, United States Code, Section 5006(h). On September 19, 1974, Morandi was 22 years old (Tr. 279) and accordingly, a young adult offender under Title 18, United States Code, Section 4209. The express findings that are necessary when not treating an eligible defendant under the Youth Correction Act are not required in the case of a defendant eligible for treatment as a young adult offender. *United States* v. *Kaylor, supra,* 491 F.2d at 1137.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ALAN R. KAUFMAN,
JOHN D. GORDAN, III,
Assistant United States Attorneys, Of Counsel.

★ U. S. Government Printing Office 1975— 614—210—456

Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ALAN R. KAUFMAN being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 29th day of January, 1975 he served ~~a~~ two copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Martin Jay Siegel, Esq.
250 West 57th Street
New York, New York 10019

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing outside the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Alan R Kaufman

Sworn to before me this

29th day of January

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975